

STATE OF MICHIGAN  
COURT OF APPEALS

---

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

LAWRENCE E. TURNER,

Defendant-Appellant.

---

UNPUBLISHED

June 22, 2001

No. 221292

Wayne Circuit Court

LC No. 98-008954

Before: Smolenski, P.J., and McDonald and Jansen, JJ.

PER CURIAM.

Defendant appeals as of right from his jury trial convictions of second-degree murder, MCL 750.317, assault with intent to commit murder, MCL 750.83, and possession of a firearm during the commission of a felony (“felony-firearm”), MCL 750.227b. Defendant was sentenced to twenty-five to fifty years’ imprisonment for second-degree murder, twenty-five to fifty years’ imprisonment for assault with intent to murder, and two years’ imprisonment for felony-firearm. We affirm.

Defendant first raises two unpreserved challenges to the jury instructions. Accordingly, our review of each of these challenges is limited to whether either of these alleged instructional errors constituted plain error, and we will reverse only when the plain, forfeited error resulted in the conviction of an actually innocent defendant or when the error seriously affected the fairness, integrity, or public reputation of judicial proceedings, independent of the defendant’s innocence. *People v Carines*, 460 Mich 750, 763-764; 597 NW2d 130 (1999).

First, defendant maintains that the trial court failed to accurately define the third species of intent for second-degree murder. We disagree. A criminal defendant’s right to a fair trial by jury includes the right to have a properly instructed jury consider the evidence presented against him. *People v Mills*, 450 Mich 61, 80; 537 NW2d 909 (1995); *People v Cain*, 238 Mich App 95, 127-128; 605 NW2d 28 (1999). To determine if the jury was erroneously instructed, the instructions should be reviewed in their entirety. *People v Daniel*, 207 Mich App 47, 53; 523 NW2d 830 (1994). Even if the jury was imperfectly instructed, there is no error requiring reversal provided the instructions fairly presented the issues to be tried and adequately protected the defendant’s rights. *Daniel*, *supra* at 53. Although the trial court’s instructions inadequately described the third species of intent, we are satisfied that, in their entirety, the trial court’s

instructions fairly presented the issues to be tried and adequately protected defendant's rights. Accordingly, the trial court did not commit plain error requiring reversal.

Second, defendant challenges several aspects of the trial court's instructions on reasonable doubt. We find each of these challenges to be without merit. A reasonable doubt instruction, "when read in its entirety, must leave no doubt in the mind of the reviewing court that the jury understood the burden that was placed upon the prosecutor and what constituted a reasonable doubt." *People v Hubbard (After Remand)*, 217 Mich App 459, 487; 552 NW2d 493 (1996). Although due process requires the prosecution to prove a defendant's guilt beyond a reasonable doubt, the United States Constitution neither prohibits or requires a trial court to define the concept of reasonable doubt provided a trial court instructs the jury that a defendant's guilt must be proved beyond a reasonable doubt. *Victor v Nebraska*, 511 US 1, 5; 114 S Ct 1239; 127 L Ed 2d 583 (1994) (citations omitted). Moreover, the United States Constitution does not require a trial court to utilize any particular language in informing the jury of the government's burden of proof. *Id.* Rather, the instructions, viewed in their entirety, must correctly explain the concept of reasonable doubt to the jury and must ensure that there is no reasonable likelihood that the jurors, who determined a defendant's guilt, applied the instructions in a manner that violated the constitution. *Id.* at 5-6, 22-23. Viewed in their entirety, we are satisfied that the trial court's reasonable doubt instructions informed the jurors of the prosecution's burden and what constituted a reasonable doubt, ensuring that there was no reasonable likelihood the jurors applied the instructions in a manner that violated the constitution. Accordingly, the trial court did not commit plain error requiring reversal when it instructed the jurors on reasonable doubt.

Next, defendant contends that the trial court erred when it refused to instruct the jury on voluntary and involuntary manslaughter. We disagree. The decision whether the facts or evidence support the giving of a requested instruction is within a trial court's discretion; therefore, we review a trial court's refusal to give a requested instruction for an abuse of discretion. *People v Ho*, 231 Mich App 178, 189; 585 NW2d 357 (1998).

Voluntary and involuntary manslaughter are cognate, lesser included offenses of second-degree murder. *People v Pouncey*, 437 Mich 382, 387; 471 NW2d 346 (1991); *People v Heflin*, 434 Mich 482, 496-497; 456 NW2d 10 (1990). A trial court must instruct on a cognate, lesser offense when the instruction is requested by a defendant and when the instruction is supported by the evidence. *People v Veling*, 443 Mich 23, 36; 504 NW2d 456 (1993); *People v Sullivan*, 231 Mich App 510, 517-518; 586 NW2d 578 (1998). Before instructing on a cognate, lesser offense, the trial court must examine the evidence and determine whether the evidence supports a conviction on the lesser offense. *Pouncey*, *supra* at 387; *Heflin*, *supra* at 504, 506. When examining the evidence to make this determination, the trial court must find sufficient evidence that a defendant could be convicted of the lesser offense; absent sufficient evidence, the trial court should not give the requested instruction. *Pouncey*, *supra* at 387.

A homicide is mitigated from murder to voluntary manslaughter when the defendant kills in the heat of passion. *Pouncey*, *supra* at 388-389. In this case, there was no evidence presented that defendant shot the victim in the heat of passion. Therefore, the trial court did not abuse its discretion when it refused to instruct the jury on voluntary manslaughter.

Defendant's challenge to the trial court's failure to instruct on involuntary is equally unavailing. In order for a killing to constitute involuntary manslaughter, it must be unintentional or accidental. *Heflin, supra* at 502-503. Under defendant's strategic theory of self-defense, there was no evidence presented to show that the killing was unintentional or accidental. Even if defendant had killed the victim while defending himself, such a killing would nonetheless be an intentional killing. *Heflin, supra* at 503. As such, there was insufficient evidence presented at trial that could support the finding that defendant was guilty of voluntary or involuntary manslaughter. Therefore, we are satisfied that the trial court did not abuse its discretion when it refused to instruct the jury on voluntary and involuntary manslaughter.

Finally, defendant maintains that the trial court improperly permitted the prosecution to question a non-alibi defense witness concerning her delay in contacting the police with potentially exculpatory evidence. We disagree. Because defendant failed to object to the prosecution's questioning of this witness, our review is limited to whether the questioning of this witness by the prosecution constituted plain error. MRE 103(d); *Carines, supra* at 764; *People v Grant*, 445 Mich 535, 545-546, 553; 520 NW2d 123 (1994); *People v Griffin*, 235 Mich App 27, 44; 597 NW2d 176 (1999).

The credibility of a witness is a relevant issue in every case. *People v Coleman*, 210 Mich App 1, 8; 532 NW2d 885 (1995). A witness' perception of the events she witnessed and the clarity and accuracy of a witness' memory are important factors that aid the factfinder in evaluating a witness' testimony. *People v Poole*, 444 Mich 151, 160; 506 NW2d 505 (1993). The prosecution is not required to lay any specific foundation before questioning a witness who has not come forward prior to trial. *People v Phillips*, 217 Mich App 489, 494; 552 NW2d 487 (1996).

In this case, the prosecution's questions to defendant's witness were brief and did not directly or indirectly imply that she had a duty to come forward to tell her account of the events at issue earlier. The questions were relevant to determining the quality of the witness' memory and its impact on her credibility. *Poole, supra* at 160. We are satisfied that the trial court did not commit plain error requiring reversal when it permitted the prosecution to engage in this line of questioning.

Affirmed.

/s/ Michael R. Smolenski  
/s/ Gary R. McDonald  
/s/ Kathleen Jansen